IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-5352

GREGORY ARNOLD MURPHY — PETITIONER

VS.

COMMONWEALTH OF KENTUCKY — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT COURT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I. IS THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION VIOLATED WHEN A STATE LAW PRECLUDING A CRIMINAL CONVICTION IN THE ABSENCE OF CORROBORATION OF AN ACCOMPLICE'S TESTIMONY IS REPEALED AND SAID REPEAL IS APPLIED RETROACTIVELY?

II. DOES THE FAILURE OF A STATE TRIAL COURT TO DELETE A DEFENDANT'S NAME FROM AN INCRIMINATING STATEMENT MADE BY A CO-DEFENDANT, WHO TESTIFIED AFTER THE DEFENDANT GAVE HIS TESTIMONY AT TRIAL, AMOUNT TO SUBSTANTIAL CONSTITUTIONAL ERROR BY FORCING A DEFENDANT TO YIELD ONE CONSTITUTIONAL RIGHT AT TRIAL IN ORDER TO PROTECT ANOTHER?

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OPINION BELOW

The opinion of the Supreme Court of Kentucky styled Gregory Arnold Murphy v. Commonwealth of Kentucky was rendered on May 11, 1983, and is published at 652 S.W.2d 69, and is set out in the petitioner's appendix.

OBJECTIONS TO JURISDICTION

The respondent, Commonwealth of Kentucky, objects to this Court's jurisdiction in this case for the following reason.

With respect to the issue involving the failure of the trial court to delete any reference to the petitioner made in incriminating statements of the codefendant, that issue was decided below by the Supreme Court of Kentucky based solely upon adequate state or nonfederal grounds. This Honorable Court has long adhered to the self-imposed principle that it will not review a state court judgment that is based upon an adequate and independent nonfederal ground, even though a federal question be involved. Berea College v. Kentucky, 211 U.S. 45, 53 (1908); Fox Film Corp. v. Muller, 296 U.S. 207 (1935).

Petitioner did, as he has asserted, raise his Bruton[1] issue both in the trial court and before the Supreme Court of Kentucky on his direct appeal. Petitioner asserted then, as now, that the effect of the trial court's decision not to delete references to him in his codefendant's statements was to force him to yield his constitutional right to remain silent and not to testify. Petitioner asserts he was forced to take the stand and rebut his defendant's statements.

The Supreme Court of Kentucky explicitly decided the Bruton issue raised by petitioner solely on state or nonfederal grounds. The Kentucky Court first noted that petitioner's codefendant, Norman Crittenden, took the stand in his own defense, (although after petitioner had done so), and that petitioner's counsel cross-examined the codefendant extensively about his incrimination of petitioner. The Court then stated:

> Assuming for purposes of argument, but not deciding, that no portion of Crittenden's statement or tape recording which incriminated appellant should have been heard by the jury at the time it was heard, the fact remains that Crittenden later testified to the same matters and was cross-examined about them. It would appear that his subsequent testimony and cross-examination would render harmless any error concerning incrimination by a codefendant. See Ferguson v. Commonwealth, Ky., 512 S.W.2d 501 (1974. Murphy, supra, 652 S.W.2d at 71. (Emphasis added).

As to petitioner's claim that he was forced to take the stand and, thus, required to give up his constitutional right to remain silent, the Kentucky Court below disposed of this assertion as follows:

> The difficulty with this position is that he [petitioner] made no objection of this

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[1] Bruton v. United States, 391 U.S. 12 (1968).

> nature to the trial court. Had he made such an objection, Crittenden could have been given the opportunity to testify first. If Crittenden had been the first of the two defendant's to testify, his direct testimony would have confronted appellant with the same need to testify in his own behalf. There was no requirement that Murphy be the first of the defendants to testify and Murphy, by failing to raise this issue with the trial court, precipitated the problem of which he now complains. Murphy, supra, 652 S.W.2d at 71.

The Kentucky Supreme Court thus expressly based its decision on nonfederal grounds and did not adjudge any federal right of the petitioner. The nonfederal grounds are certainly tenable and are independent of the federal question raised. Further, the nonfederal grounds are adequate to support the state court judgment on this matter. Since the state court judgment rests on adequate nonfederal grounds this Court will not take jurisdiction to review the judgment. Stembridge v. Georgia, 343 U.S. 541 (1952; Honeyman v. Hanan, 300 U.S 14 (1937); Lynch v. New York, 293 U.S. 52 (1934).

STATEMENT OF THE CASE

I. Nature of the Case

The petitioner, Gregory Arnold Murphy, (hereinafter Murphy), was convicted of murder after a trial by jury in the Jefferson Circuit Court, Jefferson County, Kentucky (Transcript of the Record, hereinafter TR 295-297). The conviction was affirmed on direct appeal to the Supreme Court of Kentucky in a published opinion rendered on May 11, 1983. The appeal was styled Gregory Arnold Murphy vs. Commonwealth of Kentucky, (No. 81-SC-572-MR) and is published at 652 S.W.2d 69 (1983). A petition for rehearing filed by Murphy was denied on July 6, 1983.

II. Course of the Proceedings

At his trial petitioner tendered an accomplice instruction which the trial court refused to give (TR 260-261; TE 635-639; Petitioner's Appendix 14). At the time the crime was committed in 1979, Kentucky's accomplice rule, former Kentucky Rule of Criminal Procedure 9.62 (RCr 9.62), was still in effect. This rule stated that "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense. . . ." The accomplice rule was repealed on September 1, 1980. Petitioner was tried and convicted of murder in February, 1981. Petitioner's tendered instruction would have instructed the jury that petitioner's codefendant was an accomplice as a matter of law by virtue of his testimony (Petitioner's Appendix 14).

On petitioner's direct appeal to the Supreme Court of Kentucky it was held by that Court that the repeal of RCr 9.62 was a procedural change making a certain class of witnesses competent without corroboration and, therefore, the trial court did not err in failing to give the accomplice instruction. Murphy, supra, 652 S.W.2d at 73. The Kentucky Supreme Court's decision in the case at bar that the abolition of RCr 9.62 was not ex post facto overruled their earlier holding in Commonwealth v. Brown, Ky., 619 S.W.2d 699 (1981). In reaching its decision in the instant case the court below found the Brown decision erroneous because the abolition of RCr 9.62 was a change in procedure only. The Kentucky Court found that the elements of the offense of which petitioner was convicted remained the same after the abolition of RCr 9.62. Likewise, the same proof was required to establish those elements after the rule change. Because the Kentucky Court was faced with a

procedural change, there could be no violation of the ex post facto clause. Murphy, supra, 652 S.W.2d at 71-73.

Prior to trial, petitioner moved to delete any reference to him made by his codefendant in statements given to police by the codefendant. The motion was overruled (TE 62). Petitioner objected to the admission of his codefendant's statements and was overruled (TE 195-198, 251-253, 483-484). Both the petitioner and his codefendant testified at trial. The decision of the Kentucky Supreme Court as to this issue was based solely on nonfederal grounds at 652 S.W.2d 70-71.

III.

Facts

The body of Kim Keller was found at approximately 10:30 a.m. on October 18, 1979, in an alley in Louisville, Kentucky (Transcript of Evidence, hereinafter TE 90-91). She had been strangled to death by a cord or rope type of instrument (TE 129). Medical testimony estimated that the murder occurred within the twelve hours preceding the discovery of the body (TE 122).

The petitioner Murphy and Norman Crittenden were indicted separately for the murder of Kim Keller. They were tried jointly and Murphy was convicted. The jury was unable to agree upon a verdict as to Crittenden (TE 679).

Murphy and his codefendant, Crittenden, were seen together at around 5:00 p.m. on October 17, 1979. Murphy was twiddling a nylon rope and was looking for Kim Keller (TE 160-161, 178-180). Two weeks earlier appellant was heard to state that he would help Crittenden kill Kim Keller (TE 164).

Norman Crittenden gave a written satement to police on October 30, 1979 (TE 194-195). This statement related that

Murphy, Crittenden, and Kim Keller were together during the early morning hours of October 18, 1979. It further related that Murphy and Kim Keller argued and that Murphy hit her and strangled her to death. Crittenden portrayed himself as nothing more than an eyewitness to the murder (Defense Exhibit No. 1, hereinafter D Ex 1).

Crittenden gave a second statement to police on September 3, 1980, wherein he admitted holding Kim Keller's arms and legs while Murphy strangled her (TE 195-196, 208). At trial Crittenden denied ever holding Kim Keller's arms and legs (TE 464). He gave the incriminating statement because he was afraid of being beaten by police (TE 464, 471). The second statement also reflected that Murphy wanted to find Kim Keller because she had beaten him out of some money. Several witnesses testified to Crittenden's reputation for truthfulness and peacefulness (TE 513-515, 524-525, 529-530, 534-535, 539, 540, 546-547, 551-552).

Petitioner Murphy offered an alibi defense at trial. He stated he was with Crittenden until 7:00 or 8:00 p.m. on October 17, 1979, and that he remained at home that evening (TE 318, 346, 374). He did not see Kim Keller that night (TE 334-336). Murphy's testimony was corroborated by his wife and father (TE 396-400, 409-422).

On rebuttal, Detective Terry Clark of the Louisville Police Depatment testified that Murphy told him on October 30, 1979, that he had seen Kim Keller the night before she died (TE 567-577). On the same day Murphy's wife told Detective Clark that she did not know of her husband's whereabouts on October 17, 1979 (TE 568-569).

The jury found appellant guilty of murder and fixed his punishment at life imprisonment (TE 679).

REASONS FOR NOT GRANTING THE WRIT

I.

THERE ARE NO SPECIAL OR COMPELLING REASONS FOR GRANTING CERTIORARI IN THIS CASE.

This Honorable Court resolves conflicts of opinion on federal questions that have arisen among lower courts, passes upon questions of wide import under the Constitution, laws, and treaties of the United States, and exercises supervisory power over lower federal courts. This Court has historically decided only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved. The respondent believes that the case at bar meets none of the criteria of this Court for a grant of certiorari review of a state court decision. See Supreme Court Rule 17.1. Under the rules of this Court a writ of certiorari is a matter of judicial discretion and will be granted only when there are very important reasons therefor. The respondent submits that the instant petition fails to set forth any sufficiently important reasons for granting the writ in this case. The issues presented in the petition, while important to the parties involved, are not sufficiently important to the public interest to warrant the grant of a writ of certiorari by this Honorable Court. Further, the issues raised in the petition are concerned with unique and isolated fact patterns that are not likely to recur in the Commonwealth of Kentucky or its sister states.

II.

AFFIRMANCE OF PETITIONER'S CONVICTION IS NOT A VIOLATION OF THE EX POST FACTO CLAUSE AS THE ACTION OF TE STATE COURT BELOW DOES NOT FALL WITHIN THAT PROSCRIPTION.

The abolition of RCr 9.62 was not ex post facto when applied to a crime committed before abolition of the rule but tried after abolition. Petitioner's definition of a violation

of the ex post facto clause is much too broad. It is well settled that: "[T]he inhibition upon the passage of ex post facto laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed." Gibson v. Mississippi, 162 U.S. 565, 590 (1896).

The change in Kentucky's criminal rules concerning accomplice testimony is one of procedure. The abolition of a rule requiring corroboration of accomplice testimony does not in any way change the facts that must be proved to establish guilt. The elements of the offense of which petitioner was convicted have not been changed by the abolition of RCr 9.62. The concept of "fair warning" as discussed in Marks v. United States, 430 U.S. 188 (1977), does indeed underlie the ex post facto doctrine, but such a concept is simply inapplicable to the facts presented in the instant case. The purpose of the ex post facto prohibition is that of preventing unfair and oppressive legislation. Malloy v. South Carolina, 237 U.S. 180 (1915). Nothing about the change in the law in the case at bar is the least bit unfair. While there may be some procedural rights that are subject to the ex post facto doctrine, such rights must be truly substantial to trigger the ex post facto prohibition. See, e.g., Thompson v. Utah, 170 U.S. 343 (1898), but see, Williams v. Florida, 399 U.S. 78 (1970). The rule change below was simply a procedural change making a certain class of witnesses competent without corroboration. The Supreme Court of Kentucky expressed this as follows:

> Kentucky followed the common law and permitted a conviction on the uncorroborated testimony of an accomplice until the adoption of section 239 of the criminal code in 1854 which prohibited a conviction solely upon uncorroborated testimony of an accomplice. This code provision was carried intact into subsequent criminal codes and into RCr 9.62.

> The effect of the code provisions and RCr 9.62 was that testimony, otherwise competent, was deemed to be incredible as a matter of law unless corroborated in some degree. With the abolition of RCr 9.62 we have returned to the procedure as it existed at common law.
>
> The change is one of procedure. It does not take less evidence to convict now than before the rule was abolished. The same facts must be established to prove murder or manslaughter now as before. The only change effected by the abolition of RCr 9.62 is that an impediment to the credibility of certain witnesses has been removed. Murphy, supra, 652 S.W.2d at 72.

At the time of petitioner's trial RCr 9.62 was already abolished and Commonwealth v. Brown, supra, had not been decided. Therefore, petitioner had no reliance on the Brown decision and petitioner did not even make an ex post facto argument to the trial court when he requested and was denied an accomplice instruction.

The court below correctly referred to Hopt v. People of Utah, 110 U.S. 574 (1884) for the principle that abolition of RCr 9.62 was a procedural change. The Kentucky Supreme Court stated:

> In Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884), the Supreme Court held that a statute which removed the ineligibility of felons as witnesses was applicable in the trial of crimes committed before the passage of the statute. Thus, a conviction was upheld based upon the use of testimony which could not have been used when the crime was committed. The court held that the statute simply enlarged the class of persons competent to testify and was procedural.
>
> Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offence was committed, might in respect of that offence, be obnoxious to the constitutional inhibition upon ex post facto laws. But alterations which do not increase the punishment, nor change the ingredients of the offence or the ultimate facts necessary

> to establish guilt, but -- leave untouched the nature of the crime and the amount or degree of proof essential to conviction -- only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offense charged. 110 U.S. at 590, 4 S.Ct. at 210.

If a statute that makes incompetent testimony competent is not violative of the ex post facto doctrine, then a rule of court that eliminates a corroboration requirement is likewise not violative of the ex post facto doctrine.

This Court has recently taken the opportunity to express its view that changes in criminal procedure are not subject to the ex post facto doctrine. In Dobbert v. Florida, 432 U.S. 282 (1977), the Court rejected an ex post facto challenge to a statutory change in Florida's death penalty law that redistributed sentencing powers between the judge and jury. Dobbert claimed that the law at the time of the offense prevented the judge from increasing a jury sentence of life imprisonment to death. Dobbert received a recommended life sentence which was increased by the trial judge to death pursuant to the statute in effect at the time of the trial. This Court held that the use of the new statute at trial was not prohibited by the ex post facto clause on the independent grounds that the statutory change was procedural and that it was ameliorative.

The Court further noted:

> Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto. 432 U.S. at 293. (Emphasis added).

If a change in the sentencing powers of the judge vis a vis the jury is not a substantial enough change in the rights of a defendant to invoke the ex post facto doctrine, then a change in a rule concerning accomplice testimony is likewise not subject to the ex post facto doctrine. See also Thompson v. Missouri, 171 U.S. 380 (1898), which involved a change in the admissibility of evidence concerning handwriting analysis.

In the case at bar, the abolition of the rule requiring corroboration of accomplice testimony in no way affected the amount of proof the Commonwealth was required to present to establish guilt. The testimony of alleged accomplices was still permitted prior to the abolition of the rule. The only change resulting from the abolition of RCr 9.62 was that accomplice testimony was no longer required to be corroborated. This change, therefore, served only to remove a restriction on the weight that may be given to accomplice testimony. Prior to the abolition of the rule, the jury, for all practical purposes, was still exposed to the testimony of such witnesses. The prosecution was still required to submit sufficient evidence to convince a jury that petitioner had, in fact, committed the crime with which he was charged. In addition to his codefendant's testimony, there was testimony that petitioner and his codefendant were looking for the deceased a few hours before the murder and that petitioner was twiddling a cord which fit the description of the murder weapon. Further, just a few days before the murder the petitioner was heard to say that he would help kill the deceased.

When examined in light of the precedents set out above, the cases relied on by petitioner are either inapposite or unsound in their reasoning. The Kentucky Supreme Court was correct in holding that retroactive application of the abolition of RCr 9.62 did not violate the ex post facto clause.

III.

THE TRIAL COURT'S FAILURE TO DELETE THE PETITIONER'S NAME FROM AN INCRIMINATING STATEMENT GIVEN BY THE CODEFENDANT DID NOT SUBSTANTIALLY PREJUDICE THE PETITIONER'S RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The respondent again asserts that the decision of the court below rested solely upon adequate nonfederal grounds that this Honorable Court should not exercise jurisdiction in this matter. In any event, the petitioner was not substantially prejudiced by the trial court's actions.

Bruton v. United States, 391 U.S. 12 (1968) requires the deletion of a defendant's name from a codefendant's out-of-court statement only when the codefendant's unavailability to testify precludes effective confrontation of the declarant. Nelson v. O'Neil, 402 U.S. 622 (1971); California v. Green, 399 U.S. 149 (1970). Under circumstances where the codefendant testifies and nothing prevents defense counsel from cross-examination of the codefendant, admission of the inculpatory out-of-court statement does not result in prejudice to the defendant. United States v. DeLamotto, 434 F.2d 289 (2d Cir. 1970); Mayes v. Commonwealth, Ky., 563 S.W.2d 4 (1978); Love v. Commonwealth, Ky., 500 S.W.2d 67 (1973); see also, Summitt v. Commonwealth, Ky., 550 S.W.2d 548 (1977). Crittenden, petitioner's codefendant, testified at trial. Petitioner had every opportunity to cross-examine Crittenden regarding his pretrial statement. As a result, no prejudice occurred by the admission of Crittenden's statement inculpating appellant.

Petitioner's additional claim that admission of the unedited statement forced him to surrender his constitutional right to remain silent is equally lacking in merit. There is absolutely no indication that petitioner would not have

testified had his name been deleted from the codefendant's statement. Petitioner presented a defense through the testimony of alibi witnesses. He was therefore not forced to present a defense through his own testimony. Appellant remained free to choose to testify or remain silent.

But most significant is the fact that the only effective means of attacking the credibility of the codefendant's out-of-court statement was an in-court, cross-examination of the declarant and not petitioner's denials of the act from the witness stand.

Because the codefendant was available for cross-examination, neither petitioner's Sixth Amendment right to confrontation of witnesses nor his Fifth Amendment right to remain silent was violated by admission of the undeleted, pretrial statement of his codefendant.

CONCLUSION

For the foregoing reasons respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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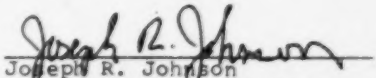
PROOF OF SERVICE

I, Joseph R. Johnson, one of counsel of respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of November, 1983, I served the petitioner with Brief for Respondent in Opposition by placing four copies of the same in the United States Mail, first class postage prepaid, and addressed to Hon. Frank W. Heft, Jr., Chief Appellate Defender of the Jefferson District Public Defender, 200 Civic Plaza, 719 West Jefferson Street, Louisville, Kentucky 40202, Counsel for Petitioner.



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